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Sphera Fund and Proposed Co-Lead Counsel

6 *[Additional Counsel Appear on Signature Page]*

7 **UNITED STATES DISTRICT COURT**
8 **NORTHERN DISTRICT OF CALIFORNIA**

9 BIKASH MOHAN MOHANTY, Individually
10 And On Behalf of All Others Similarly Situated,

11 Plaintiff,

12 v.

13 AMIR BASSAN-ESKENAZI, RAN OZ,
14 FREDERICK BALL, GAL ISRAELY, DEAN
15 GILBERT, KEN GOLDMAN, LLOYD
16 CARNEY, BRUCE SACHS, ROBERT
17 SACHS, GEOFFREY YANG, MORGAN
18 STANLEY & CO. INC., MERRILL LYNCH
PIERCE FENNER & SMITH INC., JEFFRIES
& CO. INC., THINKEQUITY PARTNERS
LLC, BIGBAND NETWORKS INC. and
COWEN & CO. INC.,

19 Defendants.

20 No. 4:07-cv-05101-SBA

21 **NOTICE OF MOTION AND MOTION
OF SPHERA FUND FOR
CONSOLIDATION OF RELATED
ACTIONS, APPOINTMENT AS LEAD
PLAINTIFF AND APPROVAL OF
LEAD PLAINTIFF'S SELECTION OF
CO-LEAD COUNSEL;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

22 Date: January 8, 2008

23 Time: 1:00 p.m.

24 Courtroom 3

25 Hon. Saundra B. Armstrong

26 *[Captions Continue on Following Pages]*

1 DENNIS KOESTERER, on behalf of himself
2 and all others similarly situated,

No. 3:07-cv-05168-MMC

3 Plaintiff,

4 v.

5 BIGBAND NETWORKS INC., AMIR
6 BASSAN-ESKENAZI, FREDERICK A.
7 BALL, RAN OZ, LLOYD CARNEY, DEAN
8 GILBERT, KENNETH A. GOLDMAN, GAL
9 ISRAELY, BRUCE SACHS, ROBERT
10 SACHS and GEOFFREY YANG,

11 Defendants.

12 ABRENA WINSTON, Individually And On
13 Behalf of All Others Similarly Situated,

No. 3:07-cv-05327-JSW

14 Plaintiff,

15 v.

16 BIGBAND NETWORKS INC., RAN OZ,
17 FREDERICK A. BALL, GAL ISRAELY,
18 DEAN GILBERT, KENNETH A.
19 GOLDMAN, LLOYD CARNEY, BRUCE I.
20 SACHS, ROBERT J. SACHS, GEOFFREY Y.
21 YANG, MERRILL LYNCH PIERCE
22 FENNER & SMITH INCORPORATED,
23 MORGAN STANLEY & CO.
24 INCORPORATED, COWEN & COMPANY
25 INC., JEFFRIES & COMPANY INC., LLC,
26 and THINKEQUITY PARTNERS LLC,

27 Defendants.

28 DONALD SMITH, on behalf of himself and all
others similarly situated,

No. 3:07-cv-05361-SI

29 Plaintiff,

30 v.

31 BIGBAND NETWORKS, INC., AMIR
32 BASSAN-ESKENAZI, FREDERICK A.
33 BALL,

34 Defendants.

35 *[Captions Continue on Following Pages]*

1 WAYNE LUZON, on behalf of himself and all
2 others similarly situated,

No. 3:07-cv-05637-WHA

3 Plaintiff,

4 v.

5 BIGBAND NETWORKS INC., AMIR
6 BASSAN-ESKENAZI, RAN OZ,
7 FREDERICK A. BALL, GAL ISRAELY,
8 DEAN GILBERT, KENNETH A.
9 GOLDMAN, LLOYD CARNEY, BRUCE I.
10 SACHS, ROBERT J. SACHS, GEOFFREY Y.
11 YANG, MORGAN STANLEY & CO.
12 INCORPORATED, MERRILL LYNCH
13 PIERCE FENNER & SMITH
14 INCORPORATED, JEFFRIES & COMPANY
15 INC., COWEN & COMPANY LLC and
16 THINKEQUITY PARTNERS LLC,

17 Defendants.

18 DEBRA L. BERNSTEIN, Individually and On
19 Behalf of All Others Similarly Situated,

No. 3:07-cv-05819-CRB

20 Plaintiff,

21 v.

22 BIGBAND NETWORKS, INC., AMIR
23 BASSAN-ESKENAZI, RAN OZ,
24 FREDERICK A. BALL, GAL ISRAELY,
25 DEAN GILBERT, KENNETH A.
26 GOLDMAN, LLOYD CARNEY, BRUCE I.
27 SACHS, ROBERT J. SACHS, GEOFFREY Y.
28 YANG, MORGAN STANLEY & CO.
INCORPORATED, JEFFRIES & COMPANY
INC., MERRILL LYNCH, PIERCE FENNER
& SMITH INCORPORATED, COWEN &
COMPANY LLC and THINKEQUITY
PARTNERS LLC,

29 Defendants.

30 *[Captions Continue on Following Page]*

1 EUGENE L. HAMMER, on behalf of himself
 2 and all others similarly situated,

No. 3:07-cv-05825-MHP

3 Plaintiff,

4 v.

5 BIGBAND NETWORKS INC., AMIR
 6 BASSAN-ESKENAZI, RAN OZ,
 7 FREDERICK A. BALL, LLOYD CARNEY,
 8 DEAN GILBERT, KENNETH A.
 9 GOLDMAN, GAL ISRAELY, BRUCE I.
 10 SACHS, ROBERT J. SACHS and GEOFFREY
 11 Y. YANG,

12 Defendants.

13 **NOTICE OF MOTION**¹

14 TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

15 PLEASE TAKE NOTICE, that on January 8, 2008, at 1:00 p.m. or as soon thereafter as
 16 the matter can be heard, in the courtroom of the Honorable Saundra B. Armstrong, situated at
 17 1301 Clay Street, Oakland, California 94612, Movant Sphera Fund (hereinafter "Movant") will
 18 move, and hereby does move, for an order (a) consolidating related actions, (b) appointing Sphera
 19 Fund as Lead Plaintiff, and (c) approving its selection of Glancy Binkow & Goldberg LLP and
 20 The Law Office of Jacob Sabo as Co-Lead Counsel for the Class.

21 Movant seeks appointment as Lead Plaintiff and approval of Lead Plaintiff's choice of
 22 counsel pursuant to the Securities Act of 1933, the Federal Rules of Civil Procedure and the
 23 PSLRA. This motion is based on this Notice, the attached memorandum of points and
 24 authorities, the declaration of Lionel Z. Glancy and the Court's complete files and records in this

25 ¹This motion is filed pursuant to Section 27 of the Securities Act as amended by the
 26 PSLRA. This Section provides that, within 60 days after publication of the required notice, any
 27 member or members of the proposed class may apply to the Court to be appointed as lead
 28 plaintiff, whether or not they have previously filed a complaint in the underlying action.
 Consequently, counsel for Movant has no way of knowing who the competing lead plaintiff
 candidates are at this time. As a result, counsel for Movant has been unable to meet and confer
 with opposing counsel, and respectfully requests that the conference requirement be waived.

1 action, as well as such further argument as the Court may allow at the hearing on this motion.

2 A copy of this Notice has been sent to all parties on the attached proof of service.

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MEMORANDUM OF POINTS AND AUTHORITIES

Movant Sphera Fund respectfully submits this memorandum of points and authorities in support of its motion for consolidation of related actions, appointment as Lead Plaintiff and approval of Lead Plaintiff's selection of Co-Lead Counsel.

I. FACTUAL BACKGROUND²

This is a federal class action on behalf of purchasers of the common stock of BigBand Networks, Inc. ("BigBand" or the "Company"), who purchased or otherwise acquired BigBand's common stock pursuant or traceable to the Company's March 14, 2007 Initial Public Offering (the "IPO") and seeking to pursue remedies under the Securities Act of 1933 (the "Securities Act").

BigBand develops, markets, and sells network-based platforms that enable cable operators and telephone companies to offer video, voice and data services across coaxial, fiber and copper networks. The Company's product applications of Digital Simulcast, TelcoTV, Switched Broadcast, High-Speed Data and Voice-over-IP are used by service providers worldwide to offer video, voice, and data services to subscribers.

The Complaint alleges that the Registration Statement and Prospectus filed with the Securities and Exchange Commissions in connection with the Company's IPO failed to disclose or indicate that: (1) the Company's switched digital video ("SDV") products suffered from interoperability issues with regard to certain video infrastructure systems; (2) the integration of the Company's SDV products required significant software customization and integration; (3) as such, growth of the Company's SDV products and sales was stagnant; (4) as a result of the above, the Company would be forced to recognize the revenue associated with its SDV product sales over an extended period of time; (5) the Company had shipped excess amounts of TelcoTV inventory to customers such as Verizon, which reduced future demand for these products; and (6) the Company lacked adequate internal and financial controls.

² Summary of facts taken from the above-captioned Class Action Complaint for Violations of the Federal Securities Laws, *Winston v. BigBand Networks, Inc., et al.*, No. 07-cv-05327-JSW, filed October 18, 2007.

1 On August 2, 2007, the Company shocked investors when it reported disappointing
 2 second quarter financial results, and announced lowered guidance for third-quarter and year-end
 3 2007, causing shares of the Company's stock to fall 27.75 percent, on unusually heavy trading
 4 volume.

5 Then on September 27, 2007, the Company revised its revenue outlook for third
 6 quarter 2007 well below its previous guidance for the quarter, the result of the Company
 7 deploying SDV across a number of customers and configurations, which required significant
 8 software customization and integration. Additionally, the Company disclosed it had experienced a
 9 slowdown in TelcoTV revenues as its major customer worked through existing inventory, and
 10 that the Company expected to report an operating loss for third-quarter fiscal 2007. On this news,
 11 shares of the Company's stock declined almost 30 percent, on unusually heavy trading volume.

12 Defendants' wrongful acts and omissions caused a precipitous decline in the market value
 13 of the Company's securities, Plaintiff and other Class Members have suffered significant losses and
 14 damages.

15 **II. PROCEDURAL HISTORY**

16 Plaintiff Bikash Mohan Mohanty commenced Case No. 07-cv-05101 on October 3, 2007.
 17 On October 4, 2007, counsel for plaintiff published a notice of the pendency of plaintiff's case on
 18 *Marketwire*, a widely circulated national business-oriented wire service. *See* Declaration of Lionel
 19 Z. Glancy In Support of Motion of Sphera Fund For Consolidation of Related Actions,
 20 Appointment As Lead Plaintiff and Approval of Lead Plaintiff's Selection of Co-Lead Counsel
 21 (the "Glancy Declaration") at Exhibit A. Subsequent to the *Mohanty* action, six related actions
 22 have been filed in this District and each of the related actions is reflected above in the caption of
 23 this document.

24 Movant brings the instant motion pursuant to the *Mohanty* complaint and notice of
 25 pendency, and files this motion prior to expiration of the 60-day period from publication of the
 26 October 4, 2007 notice.

1 **III. ARGUMENT**

2 **A. The Related Actions Should Be Consolidated³**

3 Consolidation pursuant to Rule 42(a) is proper when actions involve common questions of
 4 law and fact. *See Aronson v. McKesson HBOC, Inc.*, 79 F. Supp. 2d 1146, 1150 (N.D. Cal.
 5 1999); *In re Equity Funding Corp. of Am. Sec. Litig.*, 416 F. Supp. 161, 175 (C.D. Cal. 1976).
 6 The Court has broad discretion under this Rule to consolidate cases pending within its District.
 7 *Investors Research Co. v. United States District Court*, 877 F.2d 777 (9th Cir. 1989).

8 Courts recognize that class action shareholder suits are ideally suited to consolidation
 9 because their unification expedites proceedings, reduces duplication, and minimizes the
 10 expenditure of time and money by all concerned. *See Equity Funding*, 416 F. Supp. at 176;
 11 *Aronson*, 79 F. Supp. 2d at 1150 ("It seems obvious that fifty-four separate class actions
 12 predicated on the same set of misstatements by corporate officials, causing an artificial inflation
 13 and then a corrective drop in share prices, present common questions of fact.") Consolidation
 14 facilitates discovery, conserves judicial resources, and reduces the confusion and delay that result
 15 from prosecuting related class action cases separately. *See Equity Funding*, 416 F. Supp. at 176.

16 The actions pending before this Court present similar factual and legal issues, as they all
 17 involve the same subject matter, and present the same legal issues. Each alleges the same
 18 violations of the Securities Act, and is based on the same wrongful course of conduct. Each
 19 names the Company and certain of its officers and/or directors as defendants. Because the actions
 20 arise from the same facts and circumstances and involve the same subject matter, the same
 21 discovery and similar class certification issues will be relevant to all related actions. Accordingly,
 22 consolidation under Rule 42(a) is appropriate.

23 **1. The Court Should Resolve The Consolidation Issue
 24 As a Prerequisite to The Determination of Lead Plaintiff**

25 As Movant has an interest in moving these actions forward, it respectfully urges the

26
 27

 28 ³On November 21, 2007, the parties filed a Stipulation and [Proposed] Order Regarding
 Consolidation and Scheduling, Docket #5, which currently is pending before the Court, and
 requesting, *inter alia*, consolidation of the above-captioned actions.

1 Court to resolve the consolidation motion as soon as practicable. A prompt determination is
 2 reasonable and warranted under Rule 42(a), especially given the common questions of fact and
 3 law presented by the related actions now pending in this District.

4 **B. Sphera Fund⁴ Should Be Appointed Lead Plaintiff**

5 The PSLRA provides the procedure for selecting Lead Plaintiff in class actions brought
 6 under the Act. Within 60 days after publication of the notice, any person or group of persons
 7 who are members of the proposed class may apply to the Court to be appointed as lead plaintiff,
 8 whether or not they have previously filed a complaint in the action. 15 U.S.C. §§77z-1(a)(3)(A)
 9 and (B). The PSLRA provides a “rebuttable presumption” that the most “adequate plaintiff” to
 10 serve as Lead Plaintiff is the person or group of persons that:

- 11 (aa) has either filed the complaint or made a motion in response to a notice. . . ;
- 12 (bb) in the determination of the Court, has the largest financial interest in the relief
 13 sought by the class; and
- 14 (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil
 15 Procedure.

16 15 U.S.C. §77z-1(a)(3)(B)(iii). *See also Wenderhold v. Cylink Corp.*, 188 F.R.D. 577, 584 (N.D.
 17 Cal. 1999).

18 As set forth below, Sphera Fund satisfies all three of these criteria and thus is entitled to
 19 the presumption that it is the most adequate Lead Plaintiff for the Class.

20 **1. Sphera Fund Is Making A Motion In Response To A Notice**

21 On October 3, 2007, counsel for plaintiff Bikash Mohan Mohanty published a notice of
 22 the pendency of plaintiff's case pursuant to 15 U.S.C. §77z-1(a)(3)(A)(i), announcing that a
 23 securities class action had been filed against defendants herein, and advising purchasers of
 24 BigBand securities that they had until December 3, 2007, to file a motion to be appointed as Lead
 25

26
 27 ⁴Sphera Fund is a private hedge fund investing primarily in equities of Israeli companies
 28 traded in U.S., Israel and European markets. Sphera Fund is managed by Sphera Funds
 Management Ltd., and currently has over \$260 million capital under management.

1 Plaintiff Movant files the instant motion pursuant to plaintiff Bikash Mohan Mohanty's
 2 complaint and published notice, and submits herewith its sworn certification attesting that Sphera
 3 Fund is willing to serve as representative of the Class and willing to provide testimony at
 4 deposition and trial, if necessary. *See* Glancy Declaration, Exhibit B. Movant therefore satisfies
 5 the requirement of either filing a complaint or making a motion in response to a published notice.

6 **2. Sphera Fund Has The Largest Financial Interest In This Action**

7 The PSLRA requires a court to adopt the rebuttable presumption that "the most adequate
 8 plaintiff . . . is the person or group of persons that . . . has the largest financial interest in the relief
 9 sought by the class." 15 U.S.C. §77z-1(a)(3)(B)(iii); *Naiditch v. Applied Micro Circuits*, 2001
 10 WL 1659115 (S.D. Cal. 2001)(emphasis added). Moreover, courts have recognized that "one
 11 goal of the PSLRA is to have the plaintiff class, represented by a member with a substantial
 12 financial interest in the recovery as incentive, monitor the litigation to prevent its being
 13 "lawyer-driven." *In re Enron Corp. Securities Litigation* 206 F.R.D. 427, 438 (S.D. Tex. 2002).

14 Here, Movant purchased 95,900 shares of BigBand during the relevant period and has
 15 suffered losses of \$374,889.61. *See* Glancy Declaration, Exhibit C. To the best of its knowledge,
 16 Movant believes that it has the largest known financial interest in this case of any movant, and
 17 thus satisfies the largest financial interest requirement to be appointed as Lead Plaintiff for the
 18 Class.

19 **3. Sphera Fund Satisfies The Requirements Of Rule 23
 20 Of The Federal Rules Of Civil Procedure**

21 According to 15 U.S.C. §77z-1(a)(3)(B), in addition to possessing the largest financial
 22 interest in the outcome of the litigation, a Lead Plaintiff must "otherwise satisfy the requirements
 23 of Rule 23 of the Federal Rules of Civil Procedure." Rule 23(a) provides that a party may serve as
 24 a class representative if the following four requirements are satisfied:

25 (1) the class is so numerous that joinder of all members is
 26 impracticable, (2) there are questions of law or fact common to the
 27 class, (3) the claims or defenses of the representative parties are
 typical of the claims or defenses of the class, and (4) the
 representative parties will fairly and adequately protect the interest of
 the class.

Fed. R. Civ. P. 23(a).

In making its determination that a Lead Plaintiff satisfies the requirements of Rule 23, the Court need not raise its inquiry to the level required in ruling on a motion for class certification. A *prima facie* showing that a PSLRA movant satisfies the requirements of Rule 23 is sufficient. *See Aronson*, 79 F. Supp. 2d at 158 (N.D. Cal.1999). Courts thus limit their inquiry to the typicality and adequacy prongs of Rule 23(a), and defer examination of the remaining requirements until class certification. *Enron*, 206 F.R.D. at 441; *In re Oxford Health Plans, Inc. Sec. Litig.*, 182 F.R.D. 42, 49 (S.D.N.Y. 1998) (“[t]ypicality and adequacy of representation are the only provisions relevant to a determination of lead plaintiff under the PSLRA.”)(citing *Gluck v. Cellstar Corp.*, 976 F. Supp. 542, 546 (N.D. Tex. 1997) and *Fischler v. Amsouth Bancorporation*, 176 F.R.D. 583 (M.D. Fla 1997)); *In re Olsten Corp. Sec. Litig.*, 3 F. Supp. 2d 286, 296 (E.D.N.Y. 1998).

a. Sphera Fund's Claims Are Typical

The Rule 23(a) typicality requirement is satisfied when a plaintiff's claims arise from the same event, practice or course of conduct that gives rise to other class members' claims and plaintiff's claims are based on the same legal theory. *See Enron*, 206 F.R.D. at 441; *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 479-80 (5th Cir. 2001). Rule 23 does not require the Lead Plaintiff to be identically situated with all class members. It is enough that the Lead Plaintiff's situation shares a common issue of law or fact. *See Berger*, 257 F.3d at 480. Here, Movant's claims are typical of the claims asserted by the Class. Movant, like all members of the Class, alleges that defendants violated the Securities Act by publicly disseminating false and misleading statements concerning BigBand's business and financial performance. Movant, like all of the members of the Class, purchased BigBand securities at prices artificially inflated by defendants' misrepresentations and omissions, and was damaged thereby. The interests of Movant are closely aligned with other Class members' and they are, therefore, typical of the other members of the Class.

b. Sphera Fund Is An Adequate Representative

The adequacy of representation requirement of Rule 23 is satisfied where it is established that a representative party “will fairly and adequately protect the interests in the class.”

Accordingly:

The Ninth Circuit has held that representation is “adequate” when counsel for the class is qualified and competent, the representative’s interests are not antagonistic to the interests of absent class members, and it unlikely that the action is collusive.

Takeda, 67 F. Supp. 2d at 1133 (citing *In re Northern Dist of Cal., Dalkon Shield IUD Prod. Liab. Litig.*, 693 F.2d 847, 855 (9th Cir. 1982)). The class representative must also have “sufficient interest in the outcome of the case to ensure vigorous advocacy.” *Takeda*, 67 F. Supp. 2d at 1137 (citing *Riordan v. Smith Barney*, 113 F.R.D. 60, 64 (N.D. III 1986)). Movant has demonstrated its adequacy as Lead Plaintiff by evincing a strong desire to prosecute this action on behalf of the Class, and has shown that Movant is “ ‘willing’ and ‘able’ to ‘take an active role in and control the litigation and to protect the interests of absentees.’ ” *Berger*, 257 F.3d at 479.

Movant herein has communicated with counsel concerning this case and has made this motion to be appointed Lead Plaintiff. Movant also has sustained significant losses from its investments in BigBand securities and is, therefore, extremely motivated to pursue the claims in this action. *See* Glancy Declaration, Exhibit C.

4. Sphera Fund Is Presumptively The Most Adequate Lead Plaintiff

The presumption in favor of appointing Movant herein as Lead Plaintiff may be rebutted only upon proof “by a purported member of the Plaintiffs’ class” that the presumptively most adequate plaintiff:

- (aa) will not fairly and adequately protect the interest of the class; or
- (bb) is subject to unique defenses that render such plaintiff incapable of adequately representing the class.

15 U.S.C. § 77z-1(a)(3)(b)(iii).

The presumption that Sphera Funds is the most adequate Lead Plaintiff is not, therefore, subject to rebuttal. Movant has suffered substantial losses and believes that it has the largest

known financial interest in this case of any movant. The ability of Movant to fairly and adequately represent the Class is discussed above. Movant is not aware of any unique defenses defendants could raise against Sphera Fund that would render it inadequate to represent the Class.

Accordingly, Sphera Fund is presumptively the most-adequate Lead Plaintiff and should be appointed Lead Plaintiff for the Class.

B. The Court Should Approve Lead Plaintiff's Choice of Counsel

The PSLRA vests authority in the Lead Plaintiff to select and retain counsel, subject only to approval of the Court. *See* 15 U.S.C. §77z-1(a)(3)(B)(v). Thus, the Court should not disturb the Lead Plaintiff's choice of counsel unless "necessary to protect the interest of the plaintiff class." 15 U.S.C. §77z-1(a)(3)(B)(iii)(II)(aa); *see also In re Cavanaugh* 306 F.3d 726, 733 (9th Cir. 2002). In the present case, Movant has retained Glancy Binkow & Goldberg LLP and The Law Office of Jacob Sabo to pursue this litigation on its behalf, and will retain these firms as Plaintiff's Co-Lead Counsel, in the event it is appointed Lead Plaintiff. Glancy Binkow & Goldberg LLP and The Law Office of Jacob Sabo possess extensive experience in the area of securities litigation and have successfully prosecuted numerous securities fraud class actions on behalf of injured investors, as reflected by the firm resumés attached to the Glancy Declaration as Exhibits D and E. Thus, the Court may be assured that, by granting Movant's motion, the Class will receive the highest caliber of legal representation.

IV. CONCLUSION

For the foregoing reasons, Movant respectfully asks the Court to grant its motion and enter an Order (a) consolidating the related actions, (b) appointing Sphera Fund as Lead Plaintiff, and (c) approving its choice of Glancy Binkow & Goldberg LLP and The Law Office of Jacob Sabo as Co-Lead Counsel for the Class, and granting such other relief as the Court may deem just and proper.

||||

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1 Dated: December 3, 2007

Respectfully submitted,

2 **GLANCY BINKOW & GOLDBERG LLP**

3 By: /s/ Lionel Z. Glancy
4 Lionel Z. Glancy

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6 Los Angeles, California 90067
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15 *Attorneys for Movant Sphera Fund*
16 *and Proposed Co-Lead Counsel*